SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

DISTRICT OF COLUMBIA, Plaintiff, *v.* AMAZON.COM, INC., Defendant.	CASE NO.: 2021 CA 001775 B JUDGE: Hiram Puig-Lugo NEXT EVENT: February 11, 2022 EVENT: Initial Scheduling Conference

DEFENDANT AMAZON.COM, INC.'S REPLY TO PLAINTIFF DISTRICT OF COLUMBIA'S OPPOSITION TO DEFENDANT'S MOTION FOR A PROTECTIVE ORDER AND TO STAY DISCOVERY

The District's opposition brief does not dispute the primary reason for Amazon's motion to stay discovery: a ruling on Amazon's pending motion to dismiss could entirely eliminate the need for discovery or, alternatively, narrow the claims and scope of permissible discovery. Nor does the District dispute that it seeks an expansive volume of information in discovery, or that its entitlement to that wide swath of information is legitimately disputed and will require Court intervention to resolve. Neither the Court nor the parties should be compelled to spend unnecessary time and expense engaging in protracted discovery (and discovery disputes) now, before the parties know what, if any, claims will survive Amazon's motion to dismiss. On the other hand, the District has failed to identify any form of prejudice it will incur from a stay of discovery until the Court rules on Amazon's motion to dismiss. Instead, the District's opposition brief rests on mischaracterizations of law and misstatements of fact.

1. Discovery is not already ongoing as the District suggests. The District argues that any claimed burden and expense of responding to discovery while Amazon's motion to dismiss is pending is "undermined" by Amazon already engaging in discovery, pointing to a FOIA request

and Amazon's written objections and responses to the District's document requests. Opp. at 1. The District's argument is legally and factually incorrect.

The District's production of 48 documents pursuant to a FOIA request does not undermine Amazon's position that civil discovery has not commenced in this action. There can be no real dispute that the "FOIA disclosure regime . . . is distinct from civil discovery." *Stonehill* v. *Internal Revenue Serv.*, 558 F.3d 534, 538 (D.C. Cir. 2009); *see also Riley* v. *Fenty*, 7 A.3d 1014, 1019 n.3 (D.C. 2010) (explaining that entitlement to documents through civil litigation is "irrelevant to a determination of the availability of the records under FOIA");[1] *Horsehead Indus., Inc.* v. *U.S. EPA.*, 999 F. Supp. 59, 68 (D.D.C. 1998) (explaining the difference between FOIA and civil discovery "holds true *even if the FOIA request is made by an adverse party or a potentially adverse party in litigation against the Government*"). The District was obligated to produce these documents with or without the commencement of this litigation, and the District's unilateral declaration, over Amazon's objection, that its production was pursuant to civil discovery rather than its independent FOIA obligations does not change those obligations. And in any event, such a minimal production pales in comparison to the wide swath of information sought by the District in merits discovery and in no way creates "an unlevel playing field," Opp. at 7, if discovery is stayed until the Court rules on Amazon's pending motion to dismiss.

Furthermore, the fact that Amazon served responses and objections to the District's document requests, as it was legally obligated to do, likewise does not undermine the burden—both on Amazon and the Court—of proceeding with discovery while Amazon's motion to dismiss

[1] The District relies on a single case to support its treatment of Amazon's FOIA request as discovery in this action. Opp. at 7 (citing *Brooks* v. *D.C. Hous. Auth.*, 999 A.2d 134, 143 (D.C. 2010)). That case merely noted, as part of the Court of Appeals' recital of procedural history, that the Superior Court below had dismissed a FOIA complaint on the basis that it "lacked jurisdiction to compel production of the documents because they were the subject of the instant pending appeal." *Brooks*, 999 A.2d at 142–43. Nowhere did the Court of Appeals suggest, much less hold, that the District had the authority to "construe" FOIA requests as litigation discovery requests.

is pending. Amazon had no choice but to provide written responses and objections to the District's discovery requests because the District would not agree to extend the time for response until the Court ruled on Amazon's stay motion. *See* D.C. Super. Ct. R. Civ. P. 34(b)(2)(A) ("The party to whom the request is directed must respond in writing within 30 days after being served[.]"). As Amazon's objections and responses make clear, the scope of permissible discovery will depend on the resolution of its motion to dismiss, at which time it is willing to meet and confer to discuss the scope of production. The District cannot refuse to extend Amazon's time to respond to its document requests and then use the fact that no extension was given to claim that Amazon has agreed to engage in discovery.

2. The District's basis for distinguishing the federal cases cited by Amazon is incorrect as a matter of law. Amazon cited cases, decided by both D.C. and federal courts, explaining the practical reasons why, in complex cases such as this one, courts often stay discovery pending resolution of a motion to dismiss. *E.g., Carlyle Inv. Mgmt. L.L.C.* v. *Ace Am. Ins. Co.*, 131 A.3d 886, 891 (D.C. 2016) ("it would be inefficient and potentially unfair . . . to launch the parties into expensive discovery while the court considers whether" there is "a basis to go forward with the[] complaint" (citation omitted))[2]; *Reveal Chat Holdco, LLC* v. *Facebook, Inc.*, 2020 WL 2843369, at *4 (N.D. Cal. Apr. 10, 2020) (granting motion to stay discovery in antitrust litigation where meritorious motion to dismiss would avoid need for "broad, time-consuming and expensive" discovery (citation omitted)). The District erroneously attempts to distinguish the federal cases by stating that "those cases operate under the Federal Rules of Civil Procedure and

[2] The District attempts to distinguish *Carlyle* by arguing that it involved "contract interpretation, which is a pure question of law" requiring "no additional fact discovery." Opp. at 6 n.2. But it is axiomatic that "a motion to dismiss a complaint under Rule 12(b)(6) presents questions of law[.]" *Drake* v. *McNair*, 993 A.2d 607, 615 (citation omitted). As explained in Amazon's opening brief, no discovery is required to resolve the legal issues raised by Amazon's motion to dismiss. The District makes no arguments to the contrary.

thus do not proceed into discovery until a defendant answers the complaint or the motion to dismiss is resolved." Opp. at 6 n.2. The District is incorrect as a matter of law. The commencement of discovery in federal cases is tied to the scheduling of the parties' Rule 26(f) conference to discuss a discovery plan and the court's entry of a scheduling order at the initial case management conference, not the filing of an answer or the ruling on a motion to dismiss. Fed. R. Civ. P. 26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)[.]"). For example, in *Frame-Wilson*, one of the related cases pending in the Western District of Washington, it is not the pendency of Amazon's motion to dismiss that has resulted in a stay of discovery, but rather the court's deferral of the Rule 26(f) conference until after it rules on Amazon's motion to dismiss. Similarly, here, deferring the time for the parties to confer over an appropriate discovery plan until after the Court rules on the motion to dismiss will allow the parties to discuss a discovery plan that is tied to any claims that survive the motion to dismiss. In a complex case such as this, where discovery will be expansive and expensive—and will almost certainly require the Court's involvement to resolve disputes—such an orderly procedure will save both the parties and the Court time and money and ultimately will be more efficient.

The District's attempt to draw a distinction between federal and D.C. case law is especially ironic given the District's almost exclusive reliance on federal cases for the applicable standard for motions to stay discovery. The only D.C. case the District relies on, and extensively cites to, for the proposition that it would be prejudiced by a stay of discovery was actually in the context of a motion to stay *proceedings*, which is not at issue here. Opp. at 8–9 (citing *District of Columbia* v. *Facebook Inc.*, No. 2018 CA 008715 B, 2019 WL 7212642 (D.C. Super. Ct. May 31, 2019)). And the court in that case *granted* Facebook's motion to stay *discovery* pending resolution of

Facebook's motion to dismiss. Order, *District of Columbia* v. *Facebook*, No. 2018 CA 008715 B (D.C. Super. Ct. Mar. 8, 2019).[3]

3. The *Facebook* stay is analogous, and the District's attempt to distinguish it is not supported by the opinion. The District argues that "the motion to dismiss there was fundamentally different than Amazon's motion to dismiss here" because it "focused on a jurisdictional question." Opp. at 6 (citing Order, *District of Columbia* v. *Facebook*, No. 2018 CA 008715 B (D.C. Super. Ct. Mar. 8, 2019)). The court's order in *Facebook*, however, does not distinguish between jurisdictional arguments and arguments based on a failure to state a claim, and Facebook's motion to dismiss included both. Mem. of Law in Supp. of Facebook, Inc.'s Opposed Mot. to Dismiss Or, in the Alternative, Stay Proceedings, *District of Columbia* v. *Facebook*, No. 2018 CA 008715 B (D.C. Super Ct. Feb. 1, 2019). Thus, there is no basis for the District to distinguish this persuasive and relevant authority. Just as in *Facebook*, it is "not . . . in either party's interest to continue discovery" while Amazon's "Motion to Dismiss is not yet fully briefed and argued." Order at 2, *District of Columbia* v. *Facebook Inc.*, No. 2018 CA 008715 B (D.C. Super. Ct. March 8, 2019).

4. There is nothing "D.C.-focused" about the Amended Complaint. The District argues that the federal class action cases pending against Amazon in the Western District of Washington "should not dictate the speed at which the Court is able to move this D.C.-focused litigation." Opp. at 8 n.3. The District's Amended Complaint ("AC"), however, does not contain

[3] The District also relies heavily on a docket-entry order in *In re Amazon.com, Inc. eBook Antitrust Litigation*, which denied a letter motion to stay discovery based on "pleading deficiencies, which may be capable of being remedied." No. 1:21-cv-00351-GHW-DCF (S.D.N.Y. Oct. 7, 2021), ECF No. 108. Amazon has objected to that order by Magistrate Judge Debra Freeman as clearly erroneous and contrary to law, and the objection is currently pending before the District Court. *See* Defs.' Obj. to Magistrate Judge Freeman's Oct. 7, 2021 Orders Den. Defs.' Mots. to Stay Disc., *In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 1:21-cv-00351-GHW-DCF (S.D.N.Y. Oct. 21, 2021), ECF No. 115. The District's reliance on the docket entry, without disclosing that it has been contested and is being reviewed by the district court, is improper.

any "D.C.-focused" allegations beyond conclusory allegations that "District residents have been injured." AC ¶¶ 78, 82, 89, 95. There is otherwise nothing "D.C.-focused" about the factual allegations of the AC. Despite claiming that the case here involves "different laws by different plaintiffs who are differently situated," neither the AC nor the District's Opposition explains how those laws and how the citizens the District represents are different. Opp. at 9. Citizens of the District are proposed class members in the Western District of Washington cases, and the D.C. Antitrust Act expressly allows D.C. courts to rely on case law interpreting federal antitrust statutes as a guide to construing comparable D.C. antitrust provisions because the D.C. Antitrust Act is patterned after the federal antitrust laws. D.C. Code § 28-4515. Moreover, there is nothing D.C.-focused about the 42 document requests the District has served; they seek documents concerning the entire United States, as well as the United Kingdom and Germany; not one of them seeks documents about the District of Columbia specifically. For these reasons, it makes practical and legal sense to coordinate the burdens of discovery across these related cases.

CONCLUSION

For the foregoing reasons and those set forth in Amazon's opening brief, Amazon's motion to stay discovery pending resolution of its motion to dismiss should be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2021, a true and correct copy of the foregoing reply statement was served electronically via Case File Xpress to the following:

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